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September 8, 2006

Via Email

Gaylee Adell
Consumer Protection & Safety Division
California Public Utilities Commission

Re: Consumer Protection Initiative on Cramming Reporting Requirements

Ms. Adell:

TURN appreciates the opportunity to participate in the workshop implementing Ordering Paragraph 7 of D.06-03-013 and the opportunity to comment on the Draft Staff Report ("DSR") mailed August 11, 2006. The development of robust, comprehensive cramming related reporting requirements is crucial to the success of the Commission's goals of empowering consumers and preventing fraud through the Consumer Protection Initiative. TURN is supportive of the DSR. It provides a strong basis to allow the Commission to develop broad reporting requirements with sufficient specificity to allow implementation by carriers.

Unfortunately, during the two workshops held by staff, carriers seemed to suggest that even providing this basic information to the Commission would be costly and logistically difficult. Instead, many of the carriers, especially wireless seemed to suggest that whatever analysis they do internally should be sufficient to satisfy the Commission's

need for information. TURN does not support the idea that the carriers themselves should act as a filter to determine if there is a cramming problem in the marketplace.[1] While the carriers should be doing such analysis to protect their own business interests, the Commission should also be receiving the raw data in a timely and comprehensive fashion to ensure their enforcement team can protect consumers in California.

At the end of the second day of workshops, one staff member suggested that the direction of the discussion and the limitations and problems being proffered by the carriers would mean the resulting data would be of limited value to their enforcement efforts.[2] This would not only be unfortunate for the Commission, but a potential violation of statutory mandate to report cramming complaints. The goal of this process cannot be to minimize the carriers' cost and effort for compliance to such an extent that it makes the reports themselves useless. Instead, the Commission must first and foremost look at what Staff needs to do its job and then take into consideration all other factors, including carrier costs, as part of its decision.

The Statute Should Guide the Commission's Efforts

The ultimate goal for this process is to develop a set of useful cramming-related reporting requirements for all carriers and carrier agents. This goal is set forth in D.06-03-013 as that decision references Public Utilities Code §2889.9(d). Therefore, the legislative mandate should guide this Commission in drafting its reporting requirements. Section 2889.9(d) directs the Commission to establish reporting requirements that require

[1] For example, during the workshop a proposal was made that carriers submit to the Commission a "top ten" list of bad actors based on carrier internal analysis. TURN would support such a proposal as long as it is in addition to the reporting requirements themselves.

[2] Unfortunately, the transcript for the workshop on the second day is so poor, it is almost impossible to use. It also is only a partial transcript ending sometime before lunch.

> each billing telephone company, billing agent, and company that provides products or services that are charged on subscribers' telephone bills to provide the commission with *reports of complaints made by subscribers regarding the billing for products or services that are charged on their telephone bills* as a result of the billing and collection services that the billing telephone company provides to third parties, including affiliates of the billing telephone company.

This legislative mandate is both broader and more narrow than what is contemplated by D.06-03-013. It is broader in that it does not limit the subject of the reporting to only those complaints that take more than thirty days to resolve. However, the statute narrows the reporting requirement only to those complaints that involve the billing by third parties. The Commission's decision, on the other hand, requires carriers to report complaints of cramming involving both third parties and the carriers themselves.

While, the Commission cannot choose to do less than is called for by statute, it is in its discretion to broaden the requirement. The Commission's decision to broaden the requirement to include complaints regarding cramming by the carriers' themselves comports with the overall goals of the Commission in finding and eliminating fraudulent practices. Further, the Commission has the authority to do so pursuant to §2889.9(i) as well as other general consumer protection statutes. However, the decision to limit the reporting requirements under §2889.9(d) to only those complaints that take more than 30 days to resolve is an unacceptable limitation on the legislative mandate to track and investigate cramming and severely limits the usefulness of the reports to Commission staff and the public, as discussed below.

Scope of Reporting Requirement

TURN notes that the statutory requirement to report complaints regarding "billing" by third parties is broad. The DSR proposes what it believes should be

included in the reporting requirements as, "customer complaints seeking to remove or reduce unauthorized charges." The Report then discusses what should be considered an "unauthorized charge" for the purpose of these rules,

- addition of charges for services or features that a customer never ordered, authorized or received;
- addition of one-time charges for non-telecommunications services such as entertainment services that the customer did not order or authorize;
- charges included on a bill for a service after the customer terminated or cancelled the service;
- charges for a customer-authorized service, where the customer was misled about the true cost of the service;
- addition of false or deceptive charges

At the workshop, carriers raised concerns that this proposed definition was too broad. Instead, carriers argued that the reporting requirements should be limited only to complaints where a *service* was unauthorized, not merely individual charges or transactions. The primary concern of the carriers, as TURN understood it, focused on the difficulties in training customer service representatives to properly flag specific calls as ones that need to be reported if the criteria included too many variables. TURN understands this concern, but believes that once a concrete definition is in place, the danger of excluding a significant number of cramming complaints by adopting an overly restrictive definition outweighs any problem the carrier may have training its customer service representatives.

Several of the carriers also argued that, because the DSR's proposed definition is allegedly too broad, almost any call to a carrier customer service line would have to be reported, thereby making the data useless. TURN disagrees. The DSR discusses this concern and lists those scenarios that would clearly not be

considered cramming. The DSR provides a short list[3], but there are many others where only a minimal amount of training would allow the customer service representative to properly *exclude these from reporting*:

- calls about service quality;
- calls about errors or billing mistakes;
- complaints about rounding of minutes/charges;
- complaints or confusion regarding specific taxes or surcharges placed on a bill by a government entity (e.g. Mr. Bagley repeated example of the City of San Francisco's 911 charge);
- charges incurred by a child or other authorized user of the phone;
- calls where a customer authorized a service, was billed for it, but never received the service or the service does not meet expectations.

There are likely many other scenarios that could easily be excluded.

By proposing an overly restrictive scope of the cramming complaints to be reported, many types of fraud and abuse that have previously been considered cramming would be omitted if the carriers had their way. In addition to the FTC's web-site cramming scam discussed below, there are instances such as:

- the inclusion of vague or misleading charges with descriptions such as "service fee", "service charge," "other fees," that are not part of the contract or agreement entered into by the consumer , but because these are stand alone charges, not services, the carrier would likely argue they would not be considered cramming;
- the inclusion of charges for calls that a consumer did not make under an existing calling plan or for specific transactions such as downloads that a consumer did not request or receive;
- the "upgrade" of an existing calling plan that would entail additional charges or higher fees without that customer's authorization;

[3] There is a statement in the DSR regarding charges incurred on a lost or stolen phone that should be deleted as misleading and extraneous. TURN certainly agrees that such charges should not be considered cramming. However, the last sentence of that paragraph on page 10 suggests that a customer may bear responsibility for charges on a lost or stolen phone if not reported promptly. Not only is the statement gratuitous and has little to do with the cramming issue, TURN believes it is an incorrect interpretation of PU Code §2890, contract law, and conflicts with legislation passed by the California Assembly and Senate and currently waiting signature by the Governor. This statement should be removed.

- Additional fees or charges added onto a bill for a one-time service that the customer might have authorized through an 800 number line such as an entertainment or information service.

Missing the opportunity to track and investigate these types of crams would seriously weaken the Commission's enforcement activities and ability to protect California consumers.

TURN proposes that the final staff report include the following requirement:

> Every billing telephone company, billing agent, and company that provides products or services that are charged on subscribers' telephone bills shall create a calendar month summary report which shall include the total number of cramming-related customer complaints received and shall submit the report to the Commission's Consumer Protection and Safety Division. A "cramming-related customer complaint" is defined as any written or oral communication by a subscriber seeking to remove or reduce unauthorized, misleading or deceptive charges for products or services on the customer's telephone bill.

This tentative definition also encompasses the concepts in the DSR's discussion of complaint vs. inquiry, as further discussed below.

This broader definition is supported by the FCC's current definition of cramming. In its consumer fact sheets, the FCC very clearly defines cramming as the "the practice of placing unauthorized, misleading, or deceptive charges on your telephone bill."[4] The FCC's "Anti-Cramming Best Practices Guidelines" developed as voluntary guidelines by an industry task force in 1998 also defines cramming as "The submission or inclusion of unauthorized, misleading, or deceptive charges for products or services on End-user Customers' local

[4] http://www.fcc.gov/cgb/consumerfacts/cramming.html

telephone bills." [5] Under this definition, the FCC cannot limit its cramming investigations or enforcement only to those instances where a carrier or third party placed charges for an unauthorized service on the customer's bill.

Admittedly, the FCC's enforcement activity related to cramming has been minimal, but the same is not true of the FTC. Indeed, just this week the FTC announced a successful injunction against a company for cramming unauthorized charges for web-site hosting and design onto customer's phone bills. In many instances the victim authorized the service and agreed to have this company do a *free trial* web site design only to find charges on their phone bill immediately. The FTC sees this as cramming and is prosecuting the case.[6] However, under the carrier's proposed definition this website scam would likely not be reported because the customer authorized the service despite being charged more than was agreed.

The carriers assure the Commission that these reporting requirements are only one piece of a larger effort to crack down on fraud, suggesting that these rules need not be the "end all, be all" of the Commission's efforts to stop cramming. TURN disagrees with this sentiment. While it is true that other efforts are ongoing to help the Commission enhance its enforcement activities and increase consumer awareness, these reporting requirements are crucial to the success of those other efforts. For example, the only real way to measure the

[5] http://www.fcc.gov/Bureaus/Common_Carrier/News_Releases/1998/nrcc8050.html The FCC did not extend these Guidelines to include CMRS carriers at their inception because, "CMRS carriers do not, at this time, include charges for services rendered by third party entities." ¶70 Naturally, the rationale for this exclusion of wireless from these Guidelines is no longer relevant.

[6] See, news release, Court Halts Illegal Billing Scheme, September 7, 2006 at http://www.ftc.gov/opa/2006/09/websource.htm re: FTC v. Websource Media LLC. Et al

success of the Commission's consumer education program is through the tracking of increased volumes of calls to customer service lines. Increased volumes of calls should indicate that customers are receiving valuable information, learning to recognize fraud including cramming, and feeling empowered to call either the Commission or the carrier and report the cramming activity. Consumer education cannot, in and of itself, deter or prevent cramming. However, it can certainly help the Commission in its enforcement efforts through the reporting of increased consumer calls.

The Commission is also designating additional resources to its own complaint intake and handling processes. TURN does not have significant insight into that process, but hopes it will be successful. However, that effort does not diminish the importance of these reporting requirements. The Commission must have data on calls to both the carriers' customer service lines as well as their own complaint handling line. It is much more likely that a customer will first call their carrier with an allegation of cramming; therefore, if the Commission wants to understand the trends and volume of cramming activity it will need the carrier data in addition to its own internal data. Just to say that the Commission is doing other things to combat fraud does not minimize the importance of these rules. This reporting material is an invaluable resource to ensuring that the Commission's other efforts are successful.

The Statute Requires All Complaints to be Reported

The Commission, in D.06-03-013, explicitly limited the scope of the workshops to creating cramming-related reporting requirements that only involve

cramming complaints that take more than thirty days to resolve.[7] However, any discussion regarding whether to include the 30-day requirement may be irrelevant due to the fact that §2889.9 does not limit itself to complaints that take more than 30 days to resolve. As discussed above, while this Commission has the statutory authority to broaden the requirements of this statutory mandate, it cannot narrow the requirement thereby leaving out potentially thousands of cramming-related complaints that the Legislature expected to see reported.

The carriers argue that to include complaints that take less than 30 days to report would be over-inclusive. At the second workshop, Commissioner Chong specifically asked what the costs and benefits would be of a proposal to require the reporting of all complaints, not just those that take more than 30 days to resolve. While TURN understands that such a change would mean an increase in the amount of calls that would have to be analyzed for inclusion in the report, there are several factors that suggest that the benefits of this proposal outweigh the costs.

First, the costs are not as overwhelming and dire as suggested by the carriers. As currently proposed, the carriers are only required to report *aggregated* numbers to the Commission. (See DSR at pg. 15) Therefore, the information received by the Commission, a single aggregate number, would not change under either scenario. The only information that may vary if you include the less-than-30-day complaints is the requirement to provide the name, address and telephone number of each entity that is the subject of complaints. Further, the

[7] In a footnote, the Commission states that "We expect that many complaints may be resolved easily within thirty days." The Commission provides no support for that statement.

existence of the aging reports gives the Commission the flexibility to identify only those complaints that take longer than 30 days to resolve, and to focus on those for investigation. So the cost to the Commission would not be overwhelming.

While the amount of information would not be burdensome on the Commission, TURN recognizes that this decision will significantly change the effort made by the carriers to compile the data and submit the report. However, as long as the criteria regarding what should be included in this report are clear, then the benefits should still outweigh the costs. This is especially the case when one remembers that, once again, it is only aggregated numbers that must be tallied and provided to the Commission.

No one is denying that the carriers, in particular the wireless carriers, will have to make changes to their systems and incur some cost to comply with the statutory and Commission mandates. But, this appears to be the case no matter how broad or narrow those mandates are. It is quite clear from the discussion at the workshops that carriers make only feeble attempts to track and investigate complaints today. While some carriers have adopted manual ways of analyzing data, most seem to emphasize their policy of resolving customer complaints on the first call. Whether resolving the complaint on the first call means crediting the customer or closing the case with the disputed charge still owing, such information is rarely tracked and appears to be irrelevant to the carriers' current recordkeeping. Only the barest of information is compiled on those complaints that take over 30-days or those that make it to various types of executive escalation. Of those that take less than 30 days, it seems that the carriers have no

way of knowing whether a particular vendor is causing a problem or how many consumers are inconvenienced (at best) or defrauded by cramming. While this explanation strains common sense[8], it will have to be taken at face value in light of how informal this process has been to date. It is not fair to factor in the inadequacies of current carrier systems as "costs" in evaluating the usefulness of certain types of data.

Some carriers and staff raised concern that if carries were required to report complaints they took care of quickly (usually by settling or writing-off the charge) it would be a disincentive to settle. TURN disagrees. It is highly unlikely that this state-specific, minimal reporting requirement would drive a company's policy regarding settlements. There are many costs to the carrier if a significant number of complaints take more than thirty days to resolve. It is in the best interest of the carrier, and in most instances the customer, if the carrier settles or otherwise satisfies the customer as soon as possible. Including such a complaint in the report does not indicate culpability, but merely helps track allegations of cramming. Regardless of the resolution of the complaint, the fact that a customer called and made a cramming complaint is still relevant to the Commission's investigation and required to be reported under §2889.9.

TURN also notes that the policy of crediting consumers in order to resolve complaints quickly may actually help carriers comply with the reporting requirements as developed by the Commission. Although the discussion on this point was noticeably vague during the workshop, it would make common sense

[8] See transcript at 40-41 where Mr. Lane expressed surprise and suggested the carrier should re-think this lax recordkeeping policy since they will now be responsible for their third party vendor actions.

that carriers would have to keep track of when they credit a customer's bill for a third party charge. Certainly, the carrier is not going to incur that cost without securing for itself the ability to get that money back from the third party vendor. Therefore, these types of credits may be one way in which the carriers can keep track of cramming complaints involving third parties.

The benefits of a broader scope to the reporting, in addition to being required by the statute, means the Commission would get a better picture of the severity of the problem. In drafting these reporting requirements, the Commission must keep in mind that even if it adopted the broadest possible definitions to include any and all customer complaints, it will still only be getting, at best, a partial view of whether cramming is a persistent problem. The reporting requirements will only be capturing those customers that have actually read their bill closely; understood it enough to see there is a problem; made the decision to call the carrier to complain; continued to dispute it despite what might be perceived as non-cooperation by the carrier's customer service representative. It is documented that the vast majority of consumers do not complain and will instead just pay the bill. To then further limit the reporting to only those complaints that take more than 30-days to resolve will even further limit the scope of the data.

Yet another benefit of including the less-than-30-day complaints relates to an important point raised by Staff that must be emphasized here. In any enforcement work, no matter the industry, speed is of the essence. It is rare that bad actors, who clearly know they are breaking the law and defrauding customers,

will remain in business in any one place for very long. If the Commission has to wait over a month (the thirty day waiting period plus the reporting period) before it even receives the statistics, then it will be much longer before the Commission Staff can investigate a particular actor based on those statistics.[9] If, instead, Staff was receiving all cramming-related complaints called into the carrier on an ongoing basis, this could be extremely valuable in gathering enough data and evidence to move quickly to investigate and shut down a crammer.

TURN will admit that one cost of requiring the reporting of the less-than-30-day complaints is that it complicates the issue of how to distinguish between a complaint and an inquiry. At the workshop, participants seemed to generally agree that if a customer "inquiry" takes over thirty days to resolve, it would instead be considered a "complaint." As the DSR points out, General Order 163 defines a "complaint" in the context of the Cramming Rules.[10] That should be sufficient to ensure only complaints, not inquires, will be reported. TURN also proposes a tentative rule above that attempts to define a "complaint" in this particular context. If the carriers want to discuss possible changes to the definition of complaint, TURN would be willing to engage in that discussion, although it will resist efforts to unreasonably narrow the definition.

The Commission Should Cast a Wide Net for Reporting

TURN agrees with the discussion in the DSR regarding those entities that should be required to report and notes that most parties were in agreement on this issue at the workshop. The Legislature and this Commission have stated in the

[9] See the transcript discussion at page 36.
[10] The definition of complaint used in G.O. 163 is substantially similar to the definition included in Commission's Subscriber Complaint Reporting Rules adopted in D.00-11-015.

past that the description of entities subject to this requirement should be read broadly.[11] By requiring a broad cross-section of entities involved in the billing process, the Commission will be sure it is capturing all relevant data. TURN requests that the final staff report include specific reference to entities call "billing aggregators" as an entity required to report. This entity appears to be slightly different than many of the traditional types of billing agents or third party billers, but is still responsible for many charges that appear on customer wireless bills.

The issue here, as stated in the DSR is whether these third party entities, including billing aggregators, have any customer contact. At the workshop the carriers seemed to say that the level of direct customer contact among third party vendors, billing agents and billing aggregators varied, but was usually quite low. Naturally, only those entities with direct customer contact or whose name may appear on a customer bill so that it might receive cramming complaints should be the ones to report. The rules should not provide a blanket exclusion from compliance to any single type of company based purely on their business model. Instead, the Commission should create an exception program.

TURN supports much of the discussion during the second workshop on whether specific companies can apply for some type of exemption. TURN agrees that if a company's business plan essentially prevents the possibility of cramming or if a carrier or company has had no reportable complaints in the past, that there should be a process whereby the carrier can request to opt-out or be given an exemption from the requirement to report. However, as proposed by the DSR, such a process should require a substantive explanation from the carrier that is

[11] See DSR at p. 13.

served on the service for the proceeding that adopts the final rule and affirmative approval by the Staff for the exemption. Further, as TURN mentioned in the workshop, giving the carriers the ability to file for a waiver must be accompanied by the verification of an officer of the company both as to the fact that they have received no cramming complaints in the past year (or other significant amount of time) and that they agree to expeditiously report any complaints they do receive. This process should be audited by staff so that those carriers receiving exemptions would periodically have to confirm the absence of cramming complaints. With this caveat, TURN welcomes Staff to design an exemption process along the lines outlined in the DSR.

Staff Should Decide What Information it Needs to do its Job

The details of what carriers should include in each monthly report is best left up to Staff. With its enforcement experience, Staff should be able to determine what types of information would be required to make the reports useful. Without detailed knowledge of Staff's needs or the carrier's capabilities it is difficult to comment on the proposal in the DSR or the discussion at the workshops.

At a high level, TURN notes that the workshop discussion exposed what it sees as a dramatic flaw in the carriers' recordkeeping systems. As discussed above, if understood correctly it appears that the carriers keep very little track of the activities of their third party vendors. This is an irresponsible practice in light of the fact that those vendors, whether directly or through a billing aggregator, place charges for their service on the carriers' bills. This policy may, at least in

part, explain the low customer satisfaction with the wireless industry. TURN hopes that through this process the carriers are encouraged to improve processes so that they can better track customer complaints and allegations of fraud on the part of third party vendors.

On the issue of record retention, TURN supports at least a three year rule, including those customers that have cancelled their service and left the company. At a minimum, if there is an allegation of cramming that needs to be investigated by the Commission or law enforcement, carriers should be required to have the information on hand. TURN is assuming that it may be reasonable to require carriers to keep only those records of customers who have called in a cramming-related complaint. In light of the workshop discussion, however, it is unclear whether this would make the record retention more difficult or easier for the carrier.

Once again, TURN appreciates the opportunity to work with Staff and the carriers to design an effective set of reporting requirements that comport with Legislative requirements and help the Commission in its enforcement efforts.

Sincerely,

/s/

Christine Mailloux
Telecommunications Attorney
The Utility Reform Network

Cc: Workshop Service List